United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Orig w/affidavit of mailing

76-6162

To be argued by
RICHARD P. CARO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6162

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

LOIS HOPE SMALL and VEDA MA
also known as GORDON,
Plaintiffs-Appellees,

—*against*—

MAURICE F. KILEY, District Director, United States Immigration and Naturalization Service; and LEONARD P. CHAPMAN, Commissioner, Immigration and Naturalization Service,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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BRIEF FOR DEFENDANTS-APPELLANTS

Statement of Issues

1. Whether the District Court lacked subject matter jurisdiction, under the Administrative Procedure Act?

2. Whether the District Court lacked jurisdiction under 8 U.S.C. § 1105a to preliminarily enjoin the deportation proceedings?

3. Whether the preliminary injunction should be vacated because no determination respecting plaintiffs'-appellees' likelihood of success on the merits and irreparable injury was made by the District Court?

4. Whether the preliminary injunction should be vacated because requiring Ms. Poulson to be subject to the administrative process as required by law will not result in any irreparable injury to her and because plaintiffs'-appellees' failure to exhaust administrative remedies precludes likelihood of success on the merits from being found?

Preliminary Statement

This is an appeal from a preliminary injunction order of the United Sates District Court for the Eastern District of New York (Pratt, *J.*), entered on August 13, 1976, enjoining defendants from proceeding with the deportation proceedings respecting Ms. Veda May Poulson.

Defendants-appellees contend that the district court lacked subject matter jurisdiction to issue the preliminary injunction and alternatively that it erred in granting the preliminary injunction without first making any determination respecting plaintiffs'-appellees' likelihood of success on the merits or the existence of irreparable injury *pendente lite.* It is further the position of the defendants-appellants that no irreparable injury would be suffered by plaintiffs-appellees *pendente lite* if the administrative proceedings were to go forward and that in the absence of a complete failure to exhaustion of administrative remedies, plaintiffs'-appellees' likelihood of success on the merits can not be established.

Statement of the Case

On April 23, 1976, plaintiffs-appellees Lois Hope Small and Veda May Poulson instituted an action to temporarily enjoin defendants-appellants from conducting

deportation proceedings against Ms. Poulson [1] until Ms. Small was naturalized and to compel defendants-appellants to process Ms. Small's application for naturalization.[2] The gravamen of the complaint is that as a result of a priority directive INS personnel have been unlawfully deployed away from processing naturalization applications in order to enforce immigration laws against aliens illegally present in the country. Ms. Small's application is thus allegedly being unlawfully delayed [3] and this delay is allegedly prejudicial to Ms. Poulson because she may be deported unless Ms. Small, her alleged daughter, first becomes a citizen. Accordingly, the complaint seeks to have the deportation proceedings against Ms. Poulson enjoined until Ms. Small is naturalized.

On or about June 16, 1976, Notices of the Deposition of INS Commissioner Chapman and INS District Director Kiley for June 28, 1976, were served.[4] An informal agreement adjourning the depositions in order to allow a motion for dismissal to be made was reached after plaintiffs'-appellees' attorney obtained from INS an adjourn-

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[1] Ms. Poulson has unlawfully remained in the United States since 1964. (See Complaint ¶ 6, Joint Appendix at 4, hereinafter cited as "A. 4"; Affidavit of Leon Rosen, sworn to August 3, 1976, hereinafter referred to as "Rosen Aff.", ¶ 3 at A. 16-17. On or about March 1, 1976, Ms. Poulson was served with an Order to Show Cause why she should not be deported. (Rosen Aff. ¶ 3 at A. 16).

[2] Ms. Small has been eligible to apply for naturalization since 1973, having entered the United States as a permanent resident alien in 1968. She filed her application in January 1976. (Complaint ¶ 5 at A. 4).

[3] The Complaint was filed approximately three months after Ms. Small submitted her application for naturalization.

[4] Affidavit of Richard P. Caro, sworn to August 2, 1976 ("Caro. Aff."), ¶ 3 at A.7.

ment of Ms. Poulson's deportation hearing date.[5] Due to subsequent difficulties[6] this informal agreement was not formalized and accordingly on August 4, 1976, defendants-appellants moved the district court to dismiss the action and for entry of a protective order staying the depositions until determination of the motion for dismissal. Dismissal was sought not only for lack of subject mature jurisdiction, lack of ripeness and failure to exhaust administrative remedies but also for failure to state a cause of action because the allocation of resources in accordance with Congressional mandate and approval is a matter within the sole discretion of the Government and is not subject to judicial review. Furthermore, the district court was requested to take notice of the great number of aliens being naturalized every year and in a conference the district court was advised that in the Eastern District of New York, approximately 20,000 aliens were naturalized last year.

Plaintiffs-appellees during the course of the hearing held on August 4, 1976, served and moved the district court for a T.R.O. and for a preliminary injunction enjoining the deportation proceeding. The district court granted the T.R.O. and adjourned further proceedings on the above matters to August 13, 1976. On August 13, 1976, after a brief hearing the United States District Court for the Eastern District of New York (Pratt, *J.*), entered an order

(1) adjourning the defendants'-appellants' motion to dismiss the complaint and referring said motion to another District Judge;

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[5] Caro Aff. ¶¶ 4-5; A. 8-9.
[6] Caro Aff. ¶¶ 5-7, A. 8-10.

(2) adjourning plaintiff Lois Hope Small's application to calendar her naturalization proceedings [7] and referring said motion to another District Judge;

(3) staying the depositions until determination of the motion for dismissal; and

(4) temporarily enjoining defendants-appellants from further proceeding with Ms. Poulson's deportation proceedings until twenty (20) days after completion of the depositions of INS Commissioner Chapman and INS District Director Kiley.

In issuing the preliminary injunction the district court did not make any findings respecting plaintiffs'-appellees' likelihood of success on the merits, and irreparable injury, nor did it determine the basis for its subject matter jurisdiction which had been contested.

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[7] On August 4, 1976, plaintiff Lois Hope Small instituted a second proceeding to calender her naturalization petition. The Notice of Motion and supporting affidavit were not served on the United States Attorney for the Eastern District of New York, but only upon a regional office of the Immigration and Naturalization Service. Plaintiff, however, rather than bringing said proceedings as a separate action, caused the matter to be filed under the district court docket number assigned to the original action.

At the hearing the attorney for Ms. Small and Ms. Poulson claimed that the delay in calendering Ms. Small's petition for naturalization was unjustified and for the sole purpose of assuring that Ms. Poulson's deportation proceedings would be held prior to Ms. Small's naturalization. Government counsel denied this and advised the district court that in light of Ms. Poulson's prior attempt to obtain a change of status by possible acts of fraud, a sham marriage, and upon the refusal of Ms. Small and Ms. Poulson to answer questions or produce documents verifying their relationship, an investigation in Jamaica, B.W.I., was required to be undertaken and completed prior to the calendering of the petition. Such an investigation has been instituted and its expedition was requested by INS.

Upon the failure of the district court to schedule argument and decide the motion for dismissal, defendants-appellants filed on October 8, 1976, a Notice of Appeal from that part of the above order which granted a preliminary injunction enjoining the deportation proceedings.

ARGUMENT

POINT I

The District Court Lacked Subject Matter Jurisdiction Under The Administrative Procedure Act.

Pursuant to 8 U.S.C. § 1252(b) Ms. Poulson is the subject of adjudicatory proceedings to determine whether she is deportable under 8 U.S.C. § 1251. As the statute expressly states the procedures set forth in section 1252 (b) "are the sole and exclusive procedure for determining the deportability of an alien under this section." Provision is made whereby the responding alien may apply to have the proceedings adjourned, or postponed for good cause. 8 C.F.R. § 242.13[8]. An application in accordance with the regulation for such relief was never made by Ms. Poulson.

The only jurisdictional predicates relied upon in the complaint for resorting to the district court prior to submitting to the administrative process, see 8 U.S.C. § 1105a(c), and for enjoining the deportation proceedings were the Declaratory Judgment Act, which is not a grant of subject matter jurisdiction,[9] and the judicial review

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[8] *See* also 8 C.F.R. § 242.7 in which provision is made for cancellation of the proceedings.

[9] *See, e.g., Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950).

provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq. It is the position of the defendants-appellants that the APA is also not an independent grant of subject matter jurisdiction.

The Court should note that the question of whether section 10 of the APA constitutes an independent grant of subject matter jurisdiction is one of the questions now pending before the United States Supreme Court in *Mathews* v. *Sanders*, — U.S. —, 96 S. Ct. 2225 (1976). The controversy in *Mathews* v. *Sanders* concerns the issue of whether a decision by the Secretary of the Department of Health, Education and Welfare not to reopen proceedings which years previously resulted in a denial of social security benefits is subject to judicial review. The issues raised are first whether the decision to reopen or not is a matter solely committed to the agency's discretion, second whether second 205(g) of the Social Security Act, 42 U.S.C. § 405(g) precludes review and third whether subject matter jurisdiction to review the decision not to reopen is granted by the APA.

A. The APA is not currently recognized as an independent grant of subject matter jurisdiction by the United States Court of Appeals for the Second Circuit.

This Court last considered the merits of the issue of whether the judicial review provisions of the APA were intended to confer subject matter jurisdiction on the district court in *Aquayo* v. *Richardson*, 473 F.2d 1090 (2d Cir. 1973).[10] Judge Friendly, in writing the opinion

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[10] Recently the Second Circuit again expressly declined to decide the issue, or rely on the APA as a grant of subject matter jurisdiction. *Billiteri* v. *United States Board of Parole*, F.2d , (2d Cir., slip op. No. 732 August 30, 1976); *South Windsor Convalescent Home, Inc.* v. *Matthews*, F.2d , (2d Cir., slip op. No. 938, July 27, 1976).

for the Court, refused to affirm the district court's reliance on the APA as a jurisdictional basis for some of the claims raised, stating, in pertinent part, as follows (473 F.2d at 1101):

> "We are also unwilling to follow the district court in avoiding the jurisdictional amount problem with respect to the statutory claims by reliance on § 10 of the Administrative Procedure Act. 5 U.S.C. § 702, as an independent grant of jurisdiction. * * *"

The Court, however, found that jurisdiction existed on other grounds (473 F.2d at 1102) and commented upon the Court's prior decisions in *Cappadora* v. *Celebrezze*, 356 F.2d 1, 5-6 (2d Cir. 1966) [11], *Wolff* v. *Selective Service Bd.*, 372 F.2d 817, 828 (2d Cir. 1967), and *Mills* v. *Richardson*, 464 F.2d 995, 1001 n. 9 (2d Cir. 1972), as being "inconclusive" on the issue. Not cited, however, was the Court's decision in *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F.2d 912, 914 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960), in which it was expressly held that section 10 of the APA did not confer jurisdiction on the district courts:

> "* * * It is true that § 10(a) states that 'any person suffering legal wrong because of any agency action * * * shall be entitled to judicial review thereof.' However, neither this provision nor any

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[11] Although Judge Friendly said that in *Cappadora* v. *Celebrezze* the Court merely assumed but did not hold that the APA was a grant of jurisdiction, nevertheless the Fifth Circuit in *Oretgo* v. *Weinberger*, 516 F.2d 1005, 1008-9 (5th Cir. 1975) and the Seventh Circuit in *Sanders* v. *Weinberger*, 522 F.2d 1167, 1170 (7th Cir. 1975), *cert. granted, sub. nom. Mathews* v. *Sanders*, — U.S. —, 96 S.Ct. 2225 (1976), relied *inter alia* on *Cappadora* v. *Celebrezze* for holding that the APA was a grant of jurisdiction.

> other clause of § 10 extends the jurisdiction of the federal courts to cases not otherwise within their competence. * * * The purpose of § 10 is to define the procedures and manner of judicial review of agency action, rather than to confer jurisdiction upon the courts. * * *" (Citations omitted.)

Although *Aquayo* v. *Richardson* suggests that the issue is still open, this earlier decision has never been overruled expressly or implicitly[12] and should therefore be considered as binding precedent. Indeed, it is the Government's contention that the *Ove Gustavsson Contracting Co.* v. *Floete* construction of the APA is correct in every aspect. See *Nguyen da Yen* v. *Kissinger*, 528 F.2d 1194, 1201 (9th Cir. 1975); *Grant* v. *Hogan*, 505 F.2d 1220,

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[12] In *Mills* v. *Richardson*, *supra*, the Court in footnote 9, 464 F.2d at 1001, erroneously states that it had never decided the issue and failed to cite to this earlier decision. Similarly, in *Cappadora* v. *Celebrezze*, *supra*, the Court did not cite this decision and assumed jurisdiction existed, and in *Wolff* v. *Selective Service Bd.*, *supra*, although again failing to cite this decision, reached a conclusion, which like that reached in *Aquayo* v. *Richardson*, *supra*, was consistent with the holding in *Ove Gustavsson Contracting Co.* v. *Floete*, *supra*. *Ove Gustavsson Contracting Co.* v. *Floete*, *supra*, was cited, however, in *Toilet Goods Ass'n.* v. *Gardner*, 360 F.2d 677, 679 n. 1 (2d Cir.), *aff'd.* 387 U.S. 158 (1966), and construed as having held that the APA was not a grant of jurisdiction. Not cited as a decision on the issue of whether the APA is an independent grant of jurisdiction is *Citizens Comm. for Hudson Valley* v. *Volpe*, 425 F.2d 97, 101-02 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970). There this Court held that the issuance of a permit by the Army Corps of Engineers was reviewable final agency action under the APA, and that as such it could be the subject of an action seeking injunctive relief which the APA conferred jurisdiction to grant. It would thus appear that the Court did not use the word "jurisdiction" to mean subject matter jurisdiction and thus was likely not cited in *Aquayo* v. *Richardson*, *supra*, for this reason.

1225 (3d Cir. 1974); *Bramblett* v. *Desobry*, 490 F.2d 405, 407 (6th Cir.), *cert. denied*, 419 U.S. 872 (1974); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529, 532-33 (8th Cir. 1967); *Chouros* v. *United States*, 335 F.2d 918, 919 (10th Cir. 1964).

B. Absent An Expressed Conferral of Subject Matter Jurisdiction, Statutory Provisions Respecting Judicial Review Do Not Constitute Independent Grants of Subject Matter Jurisdiction.

The federal courts are courts of limited jurisdiction and thus are competent to adjudicate only those cases for which there is a specific conferral of jurisdiction from Congress. Accordingly, jurisdiction will not be presumed and where there is a statutory grant of jurisdiction it is to be strictly construed. See, *e.g.*, *Romero* v. *International Terminal Co.*, 358 U.S. 354, 379 (1959).

Whether a particular agency action is subject to review, whether a particular person is entitled to obtain review, and to what extent a court may review the agency's action are issues distinct from the issue of whether a particular forum has been granted subject matter jurisdiction to review the challenged agency action. While the APA addresses the former issues, it is silent as to the latter and accordingly should not be construed to be a grant of subject matter jurisdiction.

Indeed, the APA on the face of section 10(b), 5 U.S.C. § 703, supports the above distinction:

> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any ap-

> plicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction."

The above text clearly establishes that Congress intended judicial review to be available under the APA only where the reviewing court has jurisdiction by virtue of some other statutory grant of subject mater jurisdiction, either specifically under a particular statute or generally under Title 28. The APA by itself does not identify or state which courts are of "competent jurisdiction." See *Blackmar* v. *Guerre*, 342 U.S. 512, 515-16 (1952); *Lindy* v. *Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974); but see *Pickus* v. *United States Bd. of Parole*, 507 F.2d 1107, 1110 n. 5 (D.C. Cir. 1974); *Bard* v. *Seamans*, 507 F.2d 765, 767-68 (10th Cir. 1974). It is for this reason that where a statute limits review to a specific court,[13] the APA may not be relied upon to establish jurisdiction in another court. See, *e.g.*, *Ove Gustavsson Contracting Co.* v. *Floete*, *supra*, 278 F.2d at 914; *Inter-*

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[13] *See e.g.*, 8 U.S.C. § 1105a (jurisdiction to review deportation and exclusion orders); 15 U.S.C. § 45(d) (jurisdiction to review F.T.C. orders); 15 U.S.C. § 78y (jurisdiction to review SEC orders); 16 U.S.C. § 8251 (jurisdiction to review F.P.C. orders); 28 U.S.C. § 2342 (jurisdiction to review F.C.C. orders); 42 U.S.C. § 405(g) (jurisdiction to review Social Security determinations); 42 U.S.C. § 1857h-5(b) (jurisdiction to review certain E.P.A. orders). From time to time Congress has also created special courts or forums with sole jurisdiction to review a particular matter. For example, there was once a Commerce Court with sole jurisdiction to review orders and determinations of the Interstate Commerce Commission. Act of June 18, 1910, 36 Stat. 539, repealed, Act of October 22, 1913, ch. 32, 38 Stat. 219. *Cf.* Section 211 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904, conferring exclusion jurisdiction in district courts and creating and conferring exclusive appellate jurisdiction in the Temporary Emergency Court of Appeals.

national Eng. Co. v. *Richardson*, 512 F.2d 573, 577-81 (D.C. Cir. 1975) (holding that certain actions had to be brought in Court of Claims); *Olijato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 661 (D.C. Cir. 1975) (holding that APA does not permit action to be brought in a district court where the Clean Air Act confers jurisdiction on the courts of appeals). Similarly, where a general grant of jurisdiction is being relied upon, the APA does not relieve the party seeking review of the obligation to meet the jurisdictional requirements. See, *e.g.*, *Lynch* v. *HFC*, 405 U.S. 538, 547 (1972); *Aquayo* v. *Richardson*, *supra*, 473 F.2d at 1101 (holding that the APA does not relieve the party of the need to satisfy the jurisdictional amount requirement of 28 U.S.C. § 1331). Were the APA itself a separate grant of subject matter jurisdiction this would not be the case, for if section 10 is a conferral of jurisdiction, then a party may rely on it as he would rely on any other jurisdictional provision.

It is principally [14] the failure to recognize the distinction between statutes granting a right to obtain review (*i.e.*, provisions stating the type of action subject to review, the persons entitled to seek review and the standards or scope of review) and those conferring subject matter jurisdiction which underlies the conflicting decisions among and in the circuit courts of appeals. For example, in *Ratnayake* v. *Mack*, 499 F.2d 1207, 1209-10 (8th Cir. 1974), the court held that the APA was a grant

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[14] In other instances it was simply presumed or merely stated without an explanation that the APA was a grant of jurisdiction. *See, e.g., Elton Orchards, Inc.* v. *Brennan*, 508 F.2d 493, 497 (1st Cir. 1974); *Rockbridge* v. *Lincoln*, 449 F.2d 567, 569 (9th Cir. 1971); *State of Washington* v. *Udall*, 417 F.2d 1310, 1319 (9th Cir. 1969); *McEachern* v. *United States*, 321 F.2d 31, 32 (4th Cir. 1963).

of jurisdiction to review a denial of certification of an alien for permanent employment. In so holding the court relied upon decisions of the Supreme Court [15] concerning the right and scope of judicial review under the APA. It is undisputed, however, the Supreme Court has never decided the issue but rather was concerned with other questions such as the availability of review of a particular agency action, see, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra* and *Rusk* v. *Cort*, 339 U.S. 367, 372 (1962); standing to obtain review, see, *e.g.*, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, *supra*, or the scope of review, see, *e.g.*, *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975).

The Court of Appeals for the District of Columbia in *Pickus* v. *United States Bd. of Parole*, *supra*, 507 F.2d at 1109-10, while recognizing that the Supreme Court had never decided this issue, held that the APA was a grant of jurisdiction similarly on the basis of prior decisions of the circuit which did not reach the issue but which were concerned about other issues respecting review. The court in *Pickus* stated:

> " * * * In a number of decisions, this court has recognized Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, as an independent source of jurisdiction that empowers district courts to review much agency action regardless of the amount in controversy. Independent Broker-Dealers' Trade Ass'n. v. Securities and Exchange Commission, 1971, 142 U.S. App. D.C. 384, 442 F.2d 132, cert. denied, 404 U.S. 828, 92 S.Ct. 63, 30 L.Ed.2d 57; Scanwell Laboratories, Inc. v. Shaffer, 1970, 137 U.S. App. D.C. 371, 424 F.2d

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[15] The Court of Appeals cited *Association of Data Processing Service Organizations Inc.* v. *Camp*, 397 U.S. 150, 156-157 (1970), *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970), and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

859; Hurley v. Reed, 1961, 110 U.S. App. D.C. 32, 288 F.2d 844; Robbins v. Reed, 1959, 106 U.S. App. D.C. 51, 269 F.2d 242; but compare Pan American World Airways, Inc. v. Civil Aeronautics Board, 1968, 129 U.S. App. D.C. 159, 392 F.2d 483; Kansas City Power & Light Co. v. McKay, 1955, 96 U.S. App. D.C. 273, 225 F.2d 924, cert. denied, 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780. * * * "

In *Independent Broker-Dealers Trade Ass'n* v. *SEC*, the issue was not whether there was subject matter jurisdiction, but whether the SEC's action was "agency action" within the meaning of the APA and herefore reviewable. Indeed subject matter jurisdiction would have clearly existed under 28 U.S.C. § 1337. In *Scanwell Laboratories, Inc.* v. *Shaffer*, the issues were whether the plaintiff had standing, whether the action was exempt from review under the APA as a matter committed to agency discretion, and whether there was a waiver of sovereign immunity. In *Hurley* v. *Reed* and *Robbins* v. *Reed*, the issue was whether a federal prisoner could bring an action for declaratory relief against the Board of Parole in the District of Columbia respecting the legality of a revocation of parole where the prisoner was precluded from filing a writ of habeas corpus in he district of his confinement. While assuming the existence of jurisdiction, the court held that the form of relief was made available by the APA. *Robbins* v. *Reed, supra*, 269 F.2d at 244-45.[16]

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[16] In *Childs* v. *United States Bd. of Parole*, 511 F.2d 1270, 1274 (D.C. Cir. 1974), although the court found jurisdiction existed on other grounds, it also said that jurisdiction attached by virtue of section 10(a) of the APA. The only case not treated above wrich was cited in *Pickus* was *Peoples* v. *United States Dep't of Agr.*, 427 F.2d 561 (D.C. Cir. 1970). But there the court expressly refrained from deciding the issue. 427 F.2d at 564.

In contrast, prior to *Pickus* the Court of Appeals for the District of Columbia had long held that the APA was not a grant of jurisdiction. *Pan American World Airways, Inc.* v. *C.A.B.*, *supra*, 392 F.2d at 494-95; *Kansas City Power & Light Co.* v. *McKay*, *supra*, 255 F.2d at 932-33; *Aktiebolaget Bofors* v. *United States*, 194 F.2d 145, 149 (D.C. Cir. 1951); *Almour* v. *Pace*, 193 F.2d 699, 701 (D.C. Cir. 1951). In addition, in two recent cases the Court of Appeals rendered decisions which are inconsistent with the holding that the APA confers jurisdiction. *International Eng. Co.* v. *Richardson*, *supra*, 512 F.2d at 580; *Olijato Chapter of the Navajo Tribe* v. *Train*, *supra*, 515 F.2d at 660-61.

The failure to recognize and the confusion connected with the distinction between provisions dealing with reviewability and standing with those constituting grants of subject jurisdiction has been made by other courts of appeals which have held the APA a grant of subject matter jurisdiction. See, *e.g.*, *Young* v. *United States*, 498 F.2d 1211, 1221-22 (5th Cir. 1974); *Thompson* v. *United States*, 492 F.2d 1082, 1084 n. 5 (5th Cir. 1974); *Bradley* v. *Weinberger*, 483 F.2d 410, 413-14 (1st Cir. 1973).[17] But cf., *Backowski* v. *Brennan*, 502 F.2d 79, 82 (3rd Cir. 1974), *aff'd in part and rev'd in part, sub nom. Dunlop* v. *Backowski*, 421 U.S. 560, 567 (1975), in which the distinction was implicitedly accepted.

Whether a particular agency action is subject to review, whether a particular person is entitled to obtain review, and to what extent a court may review the

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[17] Subsequent decisions have cited prior decisions as decisive on the issue without engaging in independent analysis. *See, e.g., Sanders* v. *Weinberger, supra; Childs* v. *United States Bd. of Parole, supra; Elton Orchards, Inc.* v. *Brennan, supra.*

agency's action are issues distinct from the issue of whether a particular forum has been granted subject matter jurisdiction to review the challenged agency action. While the APA addresses the former issues, it is silent as to the latter and accordingly should not be construed as a grant of subject matter jurisdiction.

C. The Legislative History Of The APA Does Not Support The Contention That Congress Intended The APA To Be An Independent Grant Of Subject Matter Jurisdiction.

The legislative history of the APA [18] does not support the proposition that section 10 of the APA providing for judicial review of administrative actions was intended by Congress to be an independent grant of subject matter jurisdiction. Even courts holding the APA to be a grant of jurisdiction have generally recognized that the legislative history of the APA does not establish that Congress intended the Act to be a new grant of jurisdiction. See, *e.g.*, *Ortego* v. *Weinberger*, *supra*, 516 F.2d at 1014. Assuming this to be the case, this very fact is reason itself for the courts not to assume Congress intended to confer jurisdiction. As previously stated jurisdiction is not presumed and grants of jurisdiction are generally to be strictly construed. Here, however, jurisdiction may only be found by assuming that Congress intended to confer jurisdiction even though the "lawmakers did not explicitly address the question * * *." *Ortego* v. *Weinberger*, *supra*, 516 F.2d at 1014.

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[18] Part of the legislative history of the APA was complied is S. Jud. Comm., The Administrative Procedure Act—Legislative History 1944-46, S. Doc. No. 248, 79th Cong., 2d Sess. (1946), hereinafter referred to as "S. Doc. No. 248".

However, the legislative history of the APA, in light of the fourteen years of consideration of the twenty-one administrative law bills introduced,[19] even if not deemed conclusive, strongly supports the proposition that the APA was not intended to be an independent grant of subject matter jurisdiction.

1. Congress Rejected Proposals Expressly Addressing The Subject Matter Jurisdiction Of Courts to Review Administrative Actions and Followed The Attorney General's Recommendations

First, bills and provisions containing express grants of subject matter jurisdiction were not enacted into law. During the first eight years of consideration, Congress considered several bills which expressly dealt with the issue of subject matter jurisdiction. One principal feature of these bills was the creation of a special administrative court with exclusive jurisdiction to review actions of the federal agencies. Indeed Congress passed in 1940 one of these bills, the Logan-Walter bill, which was, however, successfully vetoed.[20]

This bill was passed over the objection of the Attorney General who had established a committee to study the practice and procedure of federal agencies and who had asked Congress to defer any action on the then pending

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[19] S. Rep. No. 752, 79th Cong., 1st Sess. (1945) ("S. Rep. No. 752"), S. Doc. No. 248 at 188, contains a chart of these bills.

[20] A summary of the history of the administrative law bills is contained in the statement of C. A. Miller, Chairman of the A.B.A. Comm. on Administrative Law for D.C., *Hearings on H.R. 1483, Vol. 19, Before the H. Jud. Comm.* 79th Cong., 1st Sess. (1945) ("House Hearings"), S. Doc. No. 248 at 63-66.

bills.[21] The Attorney General's Committee on Administrative Procedure issued a report in January 1941. S.Doc. No. 8, 77th Cong., 1st Sess. (1941). The principal focus of the Attorney General's Committee's recommendations was that Congress enact a remedial law to standardize procedure and require certain basic uniformity of practice.[22] The Attorney General's Committee with respect to the question of judicial review had majority and minority positions respecting the standards to be applied by the courts in reviewing agency action.[23] From the bills subsequently introduced to represent the majority and minority positions, it is clear that no alteration of existing subject matter jurisdiction of the courts was proposed by either. For example, H.R. 184, introduced in the 79th Congress, representing the position of the majority, contained two provisions respecting review by the courts. The first, section 310, provided for the manner and extent to which the administrative record was to be presented to the courts.[24] The second, section 311, upon a presumption that subject matter jurisdiction existed, provided certain remedies for curing certain mistakes or defects:

> "*Mistake Of Remedy Not To Preclude Judicial Review.* When in a case pending in any United States court to review an order or determination of an agency, the order or determination is subject to judicial review, but by a procedure or before a court different from that chosen by the person seeking review, the court may, instead of deny-

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[21] *Id.* at 65.

[22] Report of the Attorney General's Comm. on Administrative Procedure, *House Hearings, supra,* S. Doc. No. 248 at 68-71.

[23] *Id.* at 71.

[24] *House Hearings, supra,* Appendix, S. Doc. No. 248 at 138.

ing relief, take one or more of the following courses of action, on such conditions as it may deem just:

(a) proceed, if it has jurisdiction, as if the proper remedy had been sought; or permit or direct such amendment, rehearing, or remand to a lower court as it deems appropriate for a proper review of the order; or

(b) permit transfer of the case to a court having jurisdiction to review the order."

House Hearings, *supra*, Appendix, S. Doc. No. 248 at 138.

Similarly, for example, H.R. 1206, 79th Cong., 1st Sess. (1945), proposed to implement the minority's recommendation. Section 310 of this bill contained the following provisions:[25]

"*Judicial Review.* In order to facilitate and simplify review by the federal courts of all administrative adjudications and to eliminate technical impediments thereto, judicial review of administrative action shall be had in accordance with the following principles:

(a) *Special Provisions.* All provisions of law for judicial review applicable to particular agencies or subject matter, except as the same may be inconsistent with the provisions of this title, shall remain valid and binding, as shall all provisions

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[25] Section 310(d)-(e) of H.R. 1206 contained provisions respecting which agency's orders were reviewable, the standards or scope of review and the filing of the administrative record with the court. *House Hearings, supra, Appendix*, S. Doc. No. 248 at 175-76. Section 211 of H.R. 1206 also contained special provisions for review of agency rule-making permitting review upon an action for a declaratory judgment. *Id.* at 168-69.

specifically precluding judicial review or prescribing a broader scope of review than provided in subsection (e) hereof.

(b) *Right And Parties.* Except as otherwise specifically provided by law or excepted from the operation of this title, and regardless of whether the subject is one of constitutional or statutory right, power, privilege, immunity, or benefit any party adversely affected by any final decision of any agency rendered pursuant to the formal procedures provided herein shall be entitled to judicial review in accordance with applicable statutory provisions or, in the absence thereof, by application in equity or for writ of mandamus. All decisions upon such review shall be subject to appeal, or review upon writ of certiorari by the Supreme Court of the United States, as provided by law.

(c) *Courts And Venue.* Whenever a court shall hold that it is without jurisdiction to hear and determine a timely application or petition for such review on the ground that the same should have been filed before some other court, it shall transmit such pleadings and other papers, together with a statement of its reasons for doing, to such court of competent jurisdiction as may be designated by the applicant or petitioner, which court shall, after permitting any necessary amendments, thereupon proceed as in other cases. Where such applications or petitions are filed in the proper court but are deficient in form or type of remedy timely amendment shall be permitted. * * *"

House Hearings, *supra*, Appendix, S. Doc. No. 248 at 175-76.

The provisions in both bills presume the existence of subject matter jurisdiction. In the latter bill, for ex-

ample, section 310(b) specifies that an adversely affected party is entitled to review "in accordance with applicable statutory provisions, or in the absence thereof, by application in equity or for writ of mandamus." The bill intended then that jurisdiction would be established independently of these provisions. Similarly, both bills provided for the transfer of an action to a court of competent jurisdiction in the event review is sought in a court without jurisdiction. Clearly, under the provisions, if a court were without jurisdiction and no other federal court had jurisdiction, dismissal of the action would have been permissible. Finally, neither bill specified which federal court would have federal jurisdiction. In contrast, two other bills, contemporaneous to the above two bills, H.R. 339, 79th Cong., 1st Sess. (1945) (the Smith bill) and H.R. 1117, 79th Cong., 1st Sess. (1945) (the Cravens bill) contained the virtually identical provisions expressly specifying in which courts review was to be had. H.R. 339, § 9(c) provided:[26]

> "*Courts And Venue.* The review guaranteed by this section shall be had upon application to the courts named in statutes especially providing for judicial review or, in the absence or inadequacy thereof, to the district court of the United States (including the District Court of the District of Columbia) in the State, district and division where the party seeking court review or any one of them resides or has his principal place of business or in case such party is a corporation then where it has its principal place of business or engages in business. Whenever a court shall hold that it is without jurisdiction on the ground that application

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[26] H.R. 1117, § 9(c) is set forth in the *House Hearings, supra*, Appendix, S. Doc. No. 248 at 153-54.

should have been made to some other court, it shall transmit the pleadings and other papers to a court having jurisdiction which shall, after permitting any necessary amendments, thereupon proceed as in other cases and as though the proceeding had originally been filed therein. In any case in which application for such review is filed, timely amendments shall be permitted to state application or subsequent facts and seek additional remedies or relief. Any court having jurisdiction of any part of any controversy regarding any administrative action, rule, or order shall have full jurisdiction over all issues in such controversy with authority to grant all pertinent relief, notwithstanding that some other court may have jurisdiction of some of the issues or parties. The court review herein provided shall be commenced by the complaining party filing in the office of the clerk of the district court having jurisdiction a written complaint or petition setting forth the grounds of complaint and the relief sought. Service of process shall be had and completed by sending by registered mail a true copy of the complaint or petition to the Attorney General of the United States, or to any Assistant Attorney General of the United States at Washington, District of Columbia, and thereupon the cause, except as herein otherwise provided, shall be proceeded with in conformity with the applicable 'Rules of Civil Procedure for the District Courts of the United States.' "

House Hearings, *supra*, Appendix, S. Doc. No. 248 at 145.

Carl McFarland, who was a member of the Attorney General's Committee on Administrative Procedure, and a

member of the minority group, explained its recommendations respecting judicial review as follows:

> "* * * We believe that about all the statute should or could do would be to state the form of action, the type of acts that are reviewable in accordance with the present law, the authority of the courts to grant temporary relief so that review may be useful, but that the scope of review should be as it now is."
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> House Hearings, *supra*, S. Doc. No. 248 at 84.

It was thus not the recommendation of either the majority or the minority members of the Attorney General's Committee that any provision be made which constituted an independent grant of subject matter jurisdiction.

The McCarran-Summers bill, S.7 and H.R. 1203, 79th Cong., 1st Sess. (1945),[27] considered with the above four and other bills and ultimately enacted into law as the APA, with respect to the provisions on judicial review, relied upon and adopted the general approach of the recommendations of the Attorney General's Committee.[28] Its terms and provisions were worked out in cooperation with the Attorney General,[29] whose approval was sought [30] and ultimately obtained.[31] The Attorney General in his

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[27] H.R. 1203 which is identical to S.7 as originally introduced, is set forth in *House Hearings, supra,* Appendix, S. Doc. No. 248, at 155-61.

[28] S. Jud. Comm. Print On S.7; 79th Cong., 1st Sess. (1945), S. Doc. No. 248, at 35-40.

[29] S. Rep. No. 752, *supra,* S. Doc. No. 248 at 191; H.R. Rep. No. 1980 ("H.R. Rep. No. 1980"), 79th Cong., 2d Sess. (1946), S. Doc. No. 248 at 248-49.

[30] H.R. Rep. No. 1980, *supra,* S. Doc. No. 248 at 249.

[31] S. Rep. No. 752, *supra,* S. Doc. No. 248 at 191, 223-31; H.R. Rep. No. 1980, *supra,* S. Doc. No. 248 at 250, 291.

letter to the Senate Judiciary Committee approving the bill, commented upon the provisions respecting judicial review, stating: "It also restates the law governing judicial review of administrative action." [32] In the accompanying detailed comments on the bill, the Attorney General expressly pointed out that "Section 10 * * *, in general, declares the existing law concerning judicial review." [33] A comparison of the Attorney General's specific comments [34] on each of the provisions of section 10 with those made in the Senate [35] and House Reports [36] are clearly consistent with each other. Indeed, in the Senate and House debates, supporters of the bill generally recognized that they were in accord with the Attorney General's interpretations of the various provisions of the bill. See, *e.g.*, Remarks of Mr. Smith, House Debates, S. Doc. No. 248 at 349; Remarks of Mr. McCarran, Senate Debates, S. Doc. No. 248 at 310.[37]

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[32] Letter from Tom C. Clark, Attorney General, to Hon. Pat McCarran, dated Oct. 19, 1945, S. Rep. No. 752, *supra*, S. Doc. No. 248 at 224.

[33] Appendix to Attorney General's statement regarding revised committee print of October 5, 1945 ("App. to A.G.'s Statement") S. Rep. No. 752, *supra*, S. Doc. No. 248 at 229.

[34] *Id.*, at 229-31.

[35] S. Rep. No. 752, *supra*, S. Doc. No. 248 at 212-14.

[36] H.R. Rep. No. 1980, *supra*, S. Doc. No. 248 at 275-80.

[37] The role the Attorney General played in the development of the APA and Congress' reliance upon his recommendations and interpretations are reasons for construing the Act and determining Congressional intent consistently with the interpretation of the Act given in the Attorney General's Manual on the Administrative Procedure Act—1947. *See, e.g., American Stevedores* v. *Porello*, 330 U.S. 446, 452-53 (1947) (substantial weight given to Attorney General's interpretation of statute in determining Congressional intent).

2. Congress Expressly Intended Not to Disturb The Then Present Law Respecting Judicial Review

In neither the Attorney General's comments nor in the House and Senate Reports is there any indication that section 10 was intended to constitute an independent grant of subject matter jurisdiction. To the contrary, there are indications that Congress intended to leave undisturbed the then present scheme of the jurisdiction of the federal courts to review administrative actions.

First, at the time Congress was considering these bills and enacted the Administrative Procedure Act, a committee appointed by the Chief Justice of the United States Supreme Court [38] was reviewing the jurisdiction of the federal courts as part of the contemplated revision of the entire judicial code. Under these circumstances any change in the jurisdiction of the federal courts would have been likely deferred. Indeed within two years after the enactment of the APA, Congress did enact a complete revision of the Judicial Code.[39] It was thus more likely that the purpose of the bill was remedial as Mr. Sabath noted in the opening of the House Debates on May 24, 1946:

> "The object of the bill is, as I have stated, to improve the administration of rules and regulations made by the agencies under grants of power from Congress, and to establish uniformity of practice * * *."
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> S. Doc. No. 248 at 345-46.

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[38] See *House Hearings, supra,* statement of Clyde B. Aitchison, S. Doc. No. 248 at 128.

[39] Act of June 25, 1948, ch. 646, 62 Stat. 931 *et seq.*

Second, Congress in revising the McCarran-Summers' bill deleted the word "expressly" from the provision specifying the general availability of judicial review,[40] in order not to disturb past judicial determinations holding that a statute precluded judicial review.[41] As the Attorney General noted:

> "* * * A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U.S. 297); *American Federation of Labor* v. *National Labor Relations Board* (308 U.S. 401); *Butte, Anaconda and Pacific Railway Co.* v. *United States* (290 U.S. 127). Many matters are committed partly or wholly to agency discretion. Thus, the courts have held that the refusal by the National Labor Relations Board to issue a complaint is an exercise of discretion unreviewable by the courts (*Jacobsen* v. *National Labor Relations Board*, 120 F. (2d) 96 (C.C.A. 3d); *Marine Engineers' Beneficial Assn.* v. *National Labor Relations Board*, decided April 8, 1943 (C.C.A. 2d), certiorari denied, 320 U.S. 777). In this act, for example, the failure to grant a petition filed under section 4(d) would be similarly unreviewable." [42]

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[40] The original McCarran-Summers bill provided "Sec. 10. Except (1) so far as statutes [expressly] preclude judicial review * * *." (Deletion shown) H.R. 1203, *House Hearings, supra*, Appendix, S. Doc. No. 248 at 160.

[41] *See, e.g., Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F.2d 529 (D.C. Cir.), *cert. denied*, 335 U.S. 843 (1948). *Cf. United States* v. *Feaster*, 410 F.2d 1354, 1359-64 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969).

[42] App. to Attorney General's Statement, S. Rep. No. 752, supra, S. Doc. No. 248 at 229-30.

That this was in accord Congress' intent is clear from Mr. Walter's explanation of the provision during the House Debates on May 24, 1946:

> "Two general exceptions are made in the introductory clause of section 10. The first exempts all matters so far as statutes preclude judicial review. Congress has rarely done so. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial—see *Stark* v. *Wickard* (321 U.S. 288 at p. 317)." S. Doc. No. 248 at 368.[43]

If Congress did not intend to disturb case law holding certain agency actions not subject to review under particular statutes, which was a matter the statute expressly addressed, it is not likely that Congress intended to alter the subject matter jurisdiction of the federal courts which was a matter that the statute did not expressly address.

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[43] Similarly, Mr. Gwynne remarked:

"* * * [M]any of these agencies are not subject to court review and many of them even if we pass this bill will still not be subject to court review. This bill does not give a court review in any case where review is now precluded by statute. It simply clarifies and expands in some particulars the authority of the court in reviewing cases in which court review is not precluded by law. * * *" S. Doc. No. 248 at 374-75.

See also S. Jud. Comm. Print, *supra*, S. Doc. No. 248 at 38. respecting the impact of the bill on NLRB representation cases.

3. Congress Did Not Intend To Relieve A Party From Having To Meet Other Statutory Jurisdictional Prerequisites To Suit

The explanations of section 10(b) of the McCarran-Summers bill [44] make it eminently clear that the provision required the jurisdiction of the reviewing court to be otherwise established. The provision does not specify which court has subject matter jurisdiction but states that "judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute * * *." [45] Thus where a particular statute confers jurisdiction on a particular court, *e.g.*, the United States Courts of Appeals, review is to be sought in that court.[46]

Where there is no special provision or where a provision is "inadequate", then review is by "any relevant form of legal action (such as those for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction." [47] Where a court is jurisdictionally competent (subject matter jurisdiction, personal jurisdiction, venue) to review a particular agency action, the aggrieved party may maintain any appropriate and available form of action. This provision, however, does not relieve the aggrieved party from having to meet the jurisdictional prerequisites to maintain a particular form of action. For example, although this provision allows an aggrieved party to main-

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[44] S. Jud. Comm. Print, *supra*, S. Doc. No. 248 at 36-37; the Attorney General's Statement, *supra*, S. Doc. No. 248 at 230; S. Rep. No. 752, *supra*, S. Doc. No. 248 at 212-13; H.R. Rep. No. 1980, *supra*, S. Doc. No. 248 at 276.

[45] S. Doc. No. 248 at 8.

[46] *See, e.g.*, statutes cited in footnote 13, *supra*, at 11.

[47] *Id.* at 8.

tain a habeas corpus action, it does not relieve the aggrieved party from having to satisfy the jurisdictional requirement of being in custody. 28 U.S.C. § 2241. Similarly, monetary jurisdictional prerequisites (*e.g.*, 28 U.S.C. § 1346) must be satisfied unless there is a specific exemption or jurisdiction is otherwise established.

4. Contemporaneous Interpretations Of Congress' Intent Was That No Grant of Subject Matter Jurisdiction Was Made

Finally, that the judicial review provisions of the APA were not intended to constitute an independent grant of subject matter jurisdiction is the construction that is supported by and consistent with the understanding expressed by the Act's contemporary commentators, who agreed with the Attorney General that the Act's judicial review provisions constituted a statement of existing law.[48] As one such commentator succinctly stated "* * *

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[48] Kenneth Culp Davis, wrote 21 articles on the APA between 1946 to 1950, and had then taken the position that the judicial review provisions of the APA were not intended to change existing laws. *See, e.g.*, Davis, *Standing to Challenge and Enforce Administrative Action*, 49 Colum. L. Rev. 759, 795 (1949); Davis, *Scope of Review of Federal Administrative Action*, 50 Colum. L. Rev. 559, 619 (1950). Also, *see* Schwartz, *The American Administrative Procedure Act—1946*, 63 Law Q. Rev. 43, 61 (Eng. 1947); Scanlon, *Judicial Review under the Administrative Procedure Act*, 23 Notre Dame L. Rev. 501, 502-24 (1948); Shine, *The Administrative Procedure Act; Judicial Review Hotchpot*, 36 Geo. L. Rev. 16, 17-24, 26-27 (1947); Note, *Administrative Law, the Administrative Procedure Act*, 34 Geo. L. Rev. 457, 473-75 (1946); Note, *Judicial Review—the Effect of the Administrative Procedure Act, Section 10*, 23 Notre Dame L. Rev. 253, 254-55 (1948); Note, *The Federal Administrative Procedure Act: Codification or Reform*, 56 Yale L. Rev. 670, 689-91 (1947); *see also*, Hinman, *Effect of the Administrative Procedure Act on Judicial Review of Administrative Action*, 20 Rocky Mt. L. Rev. 267, 268-71, 279 (1948); Nathanson, *Some Comments on the Administrative Pro-*

[Footnote continued on following page]

[N]othing was intended by the APA which would modify the form or forum in which judicial review would be sought." [49]

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cedure Act, 41 Ill. L. Rev. 368, 414-15 (1946); Note, *The Administrative Procedure Act and Judicial Review of Agency Actions*, 37 Geo. L. Rev. 557, 568 (1949).

Cf. Blachy and Oatman, *The Federal Administrative Procedure Act*, 34 Geo. L. Rev. 407, 427-28 (1946); Dickinson, *The Administrative Procedure Act: Scope and Goals of Broadened Judicial Review*, 33 A.B.A.J. 434, 516 (1947); McCarran, *Three Years of the Federal Administrative Procedure Act-A Study In Legislation*, 38 Geo. L. Rev. 574, 584-87 (1950).

See generally, N.Y.U. School of Law Institute, *The Federal Administrative Procedure Act and the Proceedings of Administrative Agencies* (1947). Contemporary commentators are, however, divided on the issue. Compare Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 8 Harv. L. Rev. 308 (1967), Davis, *Administrative Law Treatise* § 23.02 (Supp. 1976), and Jaffe, *Judicial Control of Administrative Action* 165 (1965) with Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389, 445 (1970), Wright, Miller & Cooper, *Federal Practice and Procedure* § 3568 (1975), Comment, *The Jurisdictional Basis of Nonstatutory Judicial Review in Suits Against Federal Officers—Jurisdictional Amount, the Administrative Procedure Act and Mandamus*, 51 Wash. L. Rev. 97, 114-115 (1975), and Project, *Federal Administrative Law Developments— 1971*, 1972 Duke L.J. 115.

[49] Shine, *supra*, 36 Geo. L. Rev. at 25. Recently one commentary stated:

> "The better reasoned view, followed by most of the circuit courts which have considered the problem, is that section 10 does *not* confer jurisdiction. It increases access to judicial review by widening the definition of reviewable actions, but does so only for already jurisdictionally empowered courts * * *. This view is supported by the absence of any reference to statutory jurisdiction in the legislative history of the APA and, as a matter of statutory construction, by the express language of the APA." Project, *Federal Administrative Law Developments—1971, supra*, 1972 Duke L.J. at 230 (emphasis in original; footnotes omitted).

For the above reasons, the Court should conclude that the judicial review provisions of the APA, 5 U.S.C. §§ 701 *et seq.*, do not constitute an independent grant of subject matter jurisdiction and accordingly dismiss the action for lack of jurisdiction.

POINT II

The District Court Lacked Jurisdiction Under 8 U.S.C. § 1105a To Preliminarily Enjoin The Deportation Proceedings.

In 1961 Congress enacted 8 U.S.C. § 1105a to restrict judicial review of actions brought by aliens in order to eliminate "piecemeal" litigation (House Debates, 105 Cong. Rec. 12728, Remarks of Rep. Moore, co-sponsor of the amendment) and to prevent "successive dilatory appeals to various federal courts * * *." *Foti* v. *INS*, 375 U.S. 217, 226 (1963). To carry out this purpose the amendment imposed clear limitations and restrictions upon the availability of judicial review. Direct review of "all final orders of deportation" may be had only in the United States Courts of Appeals. 8 U.S.C. § 1105a(a). Direct review by the district courts[50] is available for "a final order of exclusion * * * by habeas corpus proceedings and not otherwise." 8 U.S.C. §1105a(b). Further limitations to judicial review are imposed by section 1105a(c) which requires exhaustion of administrative remedies prior to seeking judicial review and forbids repeated judicial review of an order on grounds which could have been effectively raised in the initial judicial review proceedings.

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[50] Section 1105a(b), unlike subsection (a), does not expressly vest original jurisdiction in the Courts of Appeals, and thus is clearly directed towards the jurisdiction of the district courts.

These provisions were designed "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens * * *." H.R. Rep. No. 1086, 2 U.S. Code Cong. & Admin. News, 87th Cong., 1st Sess. 2950, 2966 (1961). Thus in connection with review under section 1105a(a) the court in *Yamada* v. *INS*, 384 F.2d 214, 218 (9th Cir. 1967), noted:

> "It seems fair to assume from the statutory language, legislative history, and administrative context that Congress visualized a single administrative proceedings in which all questions relating to an alien's deportation would be raised and resolved, followed by a single petition in a court of appeals for judicial review both of the ultimate question of deportation and of all the subsidiary questions upon which it might depend."

That Congress intended section 1105a to govern the availability of review for all matters respecting the deportation and exclusion of aliens, including determinations of an alien's status under the section 1182's provisions of excludability is clear from the legislative history.[51] Congress also intended the restrictions of section 1105a to be applicable to aliens without the country seeking to gain entry, H.R. Rep. No. 1086, *supra*, at 2974, and to those who were present within the country on a temporary basis, as, for example, those who were awaiting a decision or those who were guests, H.R. Rep. No. 1086, *supra*, 2974 and 2977, such as visitors and students. There would have been no point in so limiting the jurisdiction of the courts of appeals and the district courts if the statute is construed to allow aliens to by-pass the administrative process by obtaining review prior to agency

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[51] H.R. Rep. No. 1086, *supra*, 2974-77; see also S. Rep. No. 646, 87th Cong., 1st Sess. (1961).

action, and then again after final agency action. The evasive and dilatory tatics and piecemeal litigation sought to be curtailed by Congress, *Chang Fan Kwok* v. *INS*, 392 U.S. 206, 214 (1968), would then remain available, if not enlarged. If, however, resort to the courts is construed as being limited to reviewing final agency action, then as Congress intended, an alien would not be able to forestall or delay the administrative process or entry of final agency orders of exclusion or deportation. This would preclude judicial determinations of matters which should first be decided by the agency.

Finally, here the district court should be found to have lacked jurisdiction for the reason that jurisdiction is precluded by 8 U.S.C. § 1105a(a) which reserves review of matters pertaining to deportation proceedings exclusively to the Courts of Appeals, since the issues raised in this lawsuit would clearly be reviewable by this Court under its direct or pendent jurisdiction as subsidiary issues to that of Ms. Poulson's deportability. *Foti* v. *INS*, *supra*, 227-30.

The court in *Yamada* v. *INS*, *supra*, which prior to *Cheng Fan Kwok* v. *INS*, *supra*, construed section 1105a(a) to preclude review of an order made after a final order of deportation had been made and not pursuant to proceedings held under section 1252(b) noted the following exception (384 F.2d at 218 n. 7):

> "Orders made in advance of the deportation proceedings which determine the alien's deportability as a matter of substance may stand on a different footing. Although it has been held that such orders are not independently reviewable under § 106(a), if no deportation order is in fact entered [Martin v. Gardner, 378 F.2d 352 (7th Cir. 1967); Mendez v. Major, 340 F.2d 128, 131 (8th Cir. 1965); cf. Samala v. Immigration & Natu-

> ralization Service, 336 F.2d 7, 12-13 (5th Cir. 1964)], familiar general principles would support review of all preliminary and subsidiary determinations in connection with review of a deportation order which rested upon them."

This determination was left undisturbed by the Supreme Court's decision in *Cheng Fan Kwok* v. *INS*, *supra*, 392 U.S. at 216 n. 16, wherein the Court stated:

> "We intimate no views on the possibility that a court of appeals might have 'pendent jurisdiction' over denials of discretionary relief, where it already has before it a petition for review from a proceeding conducted under § 242(b) [8 U.S.C. § 1252(b)]. See Foti v. Immigration and Naturalization Service, supra, 375 U.S. at 227, n. 14."

Not only then does the preliminary injunction infringe upon a matter reserved to the exclusive jurisdiction of this Court, but the proceedings below will require the district court to determine issues which will again be decided by this Court in its review of a final order of deportation should one be entered.

POINT III

The Preliminary Injunction Should Be Vacated Because Likelihood Of Success On The Merits And Irreparable Injury Were Not Determined By The District Court To Exist.

Generally, in order to obtain preliminary injunctive relief the district court must expressly determine that the party seeking the injunction has established likelihood of success on the merits and irreparable injury *pendente lite*. *Imperial Chem. Ind. Ltd.* v. *National Distillers*, 354

F.2d 459, 461-62 (2d Cir. 1965); cf. *Sonesta* v. *Wellington Associates*, 483 F.2d 247, 251 (2d Cir. 1973). This rule is clearly applicable where a party seeks to preliminarily enjoin a federal agency's proceedings. See, *e.g.*, *Renegotiations Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20-24 (1974). Here the district court entered a preliminary injunction without making any determination whatsoever. Accordingly, the preliminary injunction should be vacated.

POINT IV

Requiring Ms. Poulson To Be Subject To The Administrative Process As Required By Law Will Not Result In Any Irreparable Injury To Her And The Failure To Exhaust Administrative Remedies Precludes Likelihood Of Success On The Merits From Being Found.

The entire purpose of the action below is to prevent Ms. Poulson from being subject to the administrative process until she can have the question of her deportability determined when she can claim to be the immediate relative of a United States citizen. Although a motion for stay of proceedings pending determination of Ms. Small's naturalization petition has never been made to the agency by Ms. Poulson, it is clear that no irreparable injury would be suffered by Ms. Poulson by requiring her to submit to the administrative process.

Pursuant to 8 U.S.C. § 1252(b) and in accordance with 8 C.F.R. § 242.5, Ms. Poulson may admit her deportability and apply to be granted the privilege of voluntary departure. See also, INS Operating Instruction 242.10 (a). If found eligible for voluntary departure, Ms. Poulson would be entitled to apply for an extension of time

within which to depart in accordance with 8 C.F.R. § 244.2.

Whether she would be granted such an extension of time is a matter "within the sole discretion of the District Director of INS." *Noel* v. *Chapman*, 508 F.2d 1023, 1025 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975). Generally, however, an extension of time is granted to those aliens from the Western Hemisphere who were present in the United States and were the spouse or unmarried child of a permanent resident alien on or before April 10, 1973.[52] *Noel* v. *Chapman*, *supra*, at 1025.

If Ms. Poulson chooses to have a determination made under 8 U.S.C. § 1252(b) respecting her deportability, formal adjudicatory hearings will be held in accordance with the provisions of 8 C.F.R. Pt. 242. She will be entitled to be represented by counsel, 8 C.F.R. § 242.10, to take depositions and introduce testimony and other evidence. 8 C.F.R. § 242.14. If Ms. Poulson is found deportable, she may file an administrative appeal, 8 C.F.R. §§ 3.1-3.8, 242.21, and if the order of deportation is affirmed, she will have six months within which to seek judicial review, 8 U.S.C. § 1152(c), by this Court. 8 U.S.C. § 1105a(a).

Application may also be made under 8 U.S.C. § 1254 for a suspension of deportation. Such discretionary relief would apparently be available to Ms. Poulson under subsection 1254(f)(3) only prior to her daughter's natu-

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[52] There may, of course, be reasons which would preclude Ms. Poulson from being found eligible for this discretionary relief. At this time, assuming she would be found eligible, she may be entitled to apply for relief under I.N.S. Operation Instruction 242.10(a)(3), (4) or (8). The applicable lengths of time for extended departure are set forth in subpart (b) of the Instruction.

ralization since Ms. Poulson would be ineligible to obtain a nonquota immigrant visa.[53] Upon proper application for suspension of deportation, 8 C.F.R. § 244.1, a hearing would be held to determine whether Ms. Poulson is eligible under the applicable statutory criteria, 8 U.S.C. § 1254 (a)(1) or (2). If prior to deportation, Ms. Poulson's daughter becomes a citizen, she may make a motion to re-open or for reconsideration, 8 C.F.R. §§ 3.2, 103.5, 242.22, or seek other appropriate relief. If, however, Ms. Poulson is ultimately deported,[54] she may still apply for readmission upon consent of the Attorney General. 8 U.S.C. § 1182(a)(17).

From the above overview, it is clear first that no immediate irreparable injury will result if the preliminary injunction is not issued. Under these circumstances, the district court should not have usurped the agency's authority to decide the issues and its right to act in the first instance. Indeed the absence of irreparable injury requires the Court to find no justification for plaintiffs' failure to first exhaust their administrative remedies, as the Supreme Court noted in *Renegotiation Board* v. *Bannercraft Clothing Co. Inc. supra*, 415 U.S. at 24:

> "* * * Without a clear showing of irreparable injury, see *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U.S. App. D.C. 106, 111, 259 F.2d 921, 926 (1958), failure to exhaust administrative remedies serves as a bar to judicial intervention

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[53] When the Immigration and Naturalization Act Amendments of 1976 go into effect in 1977, upon the naturalization of her daughter she will be entitled to a nonquota visa. P.L. 94-571, § 7, 94th Cong., 2d Sess. (1976).

[54] It is unlikely that Ms. Poulson would be deported either in the immediate or near future. *See, e.g., Foti* v. *I.N.S., supra*, 224-25, for a description of examples of protracted litigations that have ensued after a final order of deportation was entered.

> in the agency process. *Myers* [v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938)], *Sears Roebuck Co.* v. *NLRB*, 153 U.S. App. D.C. 380, 382, 473 F.2d 91, 93 (1972)."

Here the failure to first exhaust administrative remedies should be held to preclude likelihood of success on the merits from being established for there is no viable case or controversy which is ripe for adjudication. The injury complained of is anticipatory only. Ms. Poulson has not been found deportable. Furthermore, even if Ms. Poulson were to be ordered deported such order may be for reasons upon which the naturalization of Ms. Small will have no bearing.

"[J]udicial power does not extend to the determination of abstract questions", and "[c]laims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention". *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324-25 (1936), citing *Arizona* v. *California*, 283 U.S. 423, 462 (1931). Similarly, the Supreme Court in *Stearns* v. *Woods*, 236 U.S. 75, 78 (1915), noted that "[T]he province of courts is to decide real controversies, not to discuss abstract propositions." This principle has been deemed to require courts to limit themselves to the adjudication of mature causes of action:

> "* * * [Courts] must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature intervention * * * differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed or final shape. . . ." *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 243-44 (1952).

Accordingly, the failure to first exhaust administrative remedies precludes a determination of likelihood of success on the merits from being made because of lack of ripeness and prematurity.

For the same reasons it is also unlikely that plaintiffs will succeed on the merits. The action is premature, seeks judicial interference based upon a matter committed solely to the agency's discretion for which there is no grant of subject matter jurisdiction or conferral of a right of judicial review, is barred for a complete failure to exhaust administrative remedies, and is founded upon an injury that has not yet occurred and which plaintiffs could have avoided by filing a petition for naturalization three years ago.

CONCLUSION

For the reasons stated herein, the Court should vacate the preliminary injunction and dismiss the complaint.

Dated: Brooklyn, New York
November 30, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 3rd day of December, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR DEFENDANT-APPELLANT of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Leon Rosen, Esq.
60 E. 42nd Street
New York, N.Y. 10017

Evelyn Cohen

Sworn to before me this
3rd day of Dec. 1976

Martha Schaap

MARTHA SCHAAP
Notary Public, State of New York
No. [illegible]
Qualified in [illegible]